United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

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Date: Septembeer 30 1997

Case No. 95 INA 481

In the Matter of:

RESTAURANT AUCTION OUTLET,
Employer,

On behalf of:

MORDECHAI BAYEN,
Alien.

Appearance: E. S. David, Esq., of New York, New York.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of MORDECHAI BAYEN (Alien) by RESTAURANT AUCTION OUTLET (Employer) under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien appealed to BALCA under 20 CFR § 656.26.

§ 212(a)(5) of the Act, provides that an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On September 1, 1992, Employer, Restaurant Auction Outlet, filed for labor certification on behalf of the Alien, Mordechai Bayen, to fill the position of Service Technician.[2] Employer received applications from thirteen U. S. workers, none of whom was hired for the position at issue. By its letter of June 7, 1993, Employer reported that two applicants attended scheduled interviews, Mr. Henry and Mr. Chatterpaul, neither of whom was qualified, as both candidates lacked no commercial experience. AF 109.

On July 26 1993, the application was returned with advice that the original filing date was not recognized by the CO. The reasons were that Employer's June 7, 1993, response to official communications, which was postmarked July 2, 1993, and received July 6, 1993, failed to include two of the thirteen resumes sent to Employer. The CO further CO noted that the Employer reported that two of the job candidates were rejected, but did not report on the circumstances relating to the other eleven applicants. AF 118. Employer refiled the application on June 16, 1993.

The Notice of Findings (NOF) of December 13, 1994, raised the issues as to whether the job offered was full time employment within the meaning of 20 CFR § 656.3.[3] The CO directed Employer to provide persuasive evidence that the position is in fact permanent and full time, and listed specific documentary evidence for the Employer to file on this issue. The NOF also found that Employer rejected U. S. applicants for reasons that were neither lawful nor job-related.

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[2]The position title was classified as Air Conditioning Mechanic under #637.261-014 of the Dictionary of Occupational Titles, published by the U. S. Department of Labor, hereinafter "the DOT." The filing date of the application was later changed to June 1, 1993 because of Employer's failure to submit complete correspondence regarding his recruitment effort in a timely fashion. AF 103, 104, 109, 118.

[3]This is the correct citation of the regulation, which was renumbered from 20 CFR § 656.50 to § 656.3.

The NOF then questioned the good faith of Employer's recruitment under the Act and regulations, as the Employer failed to contact and interview the U. S. applicants in a timely manner. Noting that the resumes of thirteen U. S. workers were referred on March 29, 30, April 1, 5, 8, and 21, the NOF observed that the Employer did not send letters to the applicant until April 20 and May 3, 1993. Moreover, the Employer failed to submit a complete report regarding its recruitment efforts, and failed to return the resumes of Mr. Henry and Mr. Chatterpaul. The CO said the Employer could rebut under this issue by providing evidence showing that none of the rejected applicants were qualified, willing, or available at the time the application was considered and referred. AF 129.

Employer's undated letter stating its Rebuttal was received February 14, 1995. Employer listed the job applicants contacted by mail who did not attend the scheduled interviews. Employer said that Mr. Wu was not qualified in that he did not have four years of experience and that Mr. Chatterpaul and Mr. Henry, whom it interviewed, also were not qualified because they lacked commercial experience. The Employer then reiterated its earlier statements that the reason it could not return the resumes of Mr. Chatterpaul and Mr. Henry is that they were never received. The Employer then argued that it did act in a timely fashion, as the resumes were received piecemeal over the period of a month, and the Employer acted in good faith under all of the circumstances.

In addressing the full time employment issue the Employer noted that it had been in business since 1983, and that it has two employees, a salesman and a sales manager. As the business involves the auction of restaurant equipment and machinery, the Employer said it constantly needs a qualified service technician to maintain freon levels, mount compressors, repair controls, and to perform other related maintenance and repair work. Employer asserted that it had employed "three refrigeration mechanics during each of the past three years." Finally, the Employer said that its volume of business in air conditioning work during the preceding three years was $15,000.00. AF 141.

The Final Determination, which was issued February 22, 1995, addressed the issues as to whether or not the job offered was full time employment. Finding that Employer's rebuttal evidence was not clear, the CO observed that the Employer has claimed to have two employees, the salesman and the sales manager, but the Employer then claimed to have hired three refrigeration mechanics during each of the preceding three years, an inconsistent representation. Moreover, the Employer conceded that its volume of business in air conditioning during those three years was no more than $15,000.00, an amount that is less than the salary that the Employer offered in the application, which suggests that the position at issue is not full time employment.

Addressing the Employer's rebuttal evidence regarding the missing resumes for Mr. Henry and Mr. Chatterpaul, the Final Determination said that the Employer should have obtained resumes or an application of some sort when it interviewed these job applicants, noting also that the Employer's rebuttal evidence concerning the other eleven job applicants failed to include reports on Mr. Nicolou and Mr. Candolfi. Lastly, the Final Determination concluded that the Employer's rebuttal on the timeliness of contact did not establish good faith, even though the Employer had argued it acted in good faith in responding to resumes that it received piecemeal over a month's time. The reasons were that the Employer's report of recruitment efforts was incomplete, and Employer failed to demonstrate a pattern of good faith recruitment efforts. Accordingly, the Employer's application for alien labor certification was denied. AF 145.

On March 28, 1995, the Employer appealed the denial of labor certification. AF 156.

Discussion

20 CFR § 656.21(b)(6) requires an employer to established that any U. S. workers who applied for the job at issue were rejected reasons that were lawful and job-related, since 20 CFR § 656.20(c)(8) requires that the position clearly be open to any qualified U. S. worker. Although the Act and regulations do not in terms state that a "good faith" effort must be made to contact the U. S. workers who apply for the job the application describes such a good faith requirement is implicit. **H.C. LaMarche Enterprises, Inc.**, 87 INA 607 (Oct. 27, 1988). Consequently, its recruiting report is expected to indicate when and how many times the Employer attempted to contact the U. S. workers who applied for the job.

This Employer received applicant resumes on March 29, 30, and on April 1, 5, 8, and 20. It agrees that interview letters were sent to the applicants on April 20, 1993 and May 3, 1993, in response to the resumes submitted to the Employer in behalf of these U. S. workers. Employer did not offer proof of any earlier telephone conversations or letters sent to these applicants. The only contacts that Employer supported with documentary evidence were the letters it sent a month after receiving the resumes. The Board has found delays of as little as one month discourage U. S. applicants in violation of 20 CFR § 545.21(b)(6). **Creative Cabinet and Store Fixture**, 89 INA 181 (Jan. 24, 1990)(en banc). The Board has also found inadequate an employer's explanation that it waited to collect all resumes before initiating contact. **Baccarat Restaurant**, 93 INA 465 (Jun.13, 1994). It follows that the Employer's delay establishes a violation of 20 CFR § 545.21 (b)(6) in this case.

Also, the Employer did not provide proof of its interviews with Mr. Henry and Mr. Chatterpaul in that it failed to submit any applications for the position or the resumes that it received at these interviews. While the Employer says it "cannot submit what it did not receive," it did not indicate that it asked the U.S. applicants for such documentation and the resumes or job applications were not available from them. Moreover, the record establishes that the resumes for these two job applicants were sent to Employer on April 21, 1993. AF 126. Also, the Employer neither documented the dates of these interviews nor submitted any written report or other evidence of the interviews to support his bald and unsupported statement that the experience of these U. S. workers was not in commercial work and that they were not qualified for that reason. **Marnic Realty,** 90 INA 048 (Nov. 21, 1990.

Because the Employer did not communicate with the U. S. job applicants in a timely manner, we find Employer's failure is not a reasonable, and that it is persuasive evidence of the absence of a good faith recruitment effort under 20 CFR §§ 656.21(b)(6) and 656.20(c)(8), and the holding in **H.C. LaMarche Enterprises,** supra. It follows that the Employer did not establish that Mr. Henry and Mr. Chatterpaul were rejected solely for lawful job-related reasons under 20 CFR § 656.21(b)(6) and that this job is open to all qualified U. S. workers under 20 CFR § 656.21(b)(8). Accordingly, the CO's findings as to this issue were supported by the evidence of record.[4]

Accordingly, the following order will enter.

[4]Employer's argument that applicants Nicolou and Candolfi were on the list included in the rebuttal letter is accepted and it appears that the CO may have overlooked the inclusion of these names in the Employer's rebuttal. While the Employer also states the $15,000 figure is in error and his business earned $150,000, it failed to respond to the questions raised by the NOF regarding the number of employees the business hired each year and the annual business volume. In this context it is not clear whether the Employer hired three service technicians each year for three years or three service technicians over the three year period or whether the $150,000 business volume is annual or represents the total for the entire three year period. It follows that Employer did not resolve the questions as to full time employment that were posed by the NOF. As the CO denied certification for the reasons set forth above, this issue is moot and does not require a finding.

ORDER

The Certifying Officer’s denial of Employer's application for alien labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within twenty days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within ten days of service of the petition and shall not exceed five, double-spaced, type-written pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 95 INA 481

RESTAURANT AUCTION OUTLET, Employer,
MORDECHAI BAYEN, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: September 17, 1997